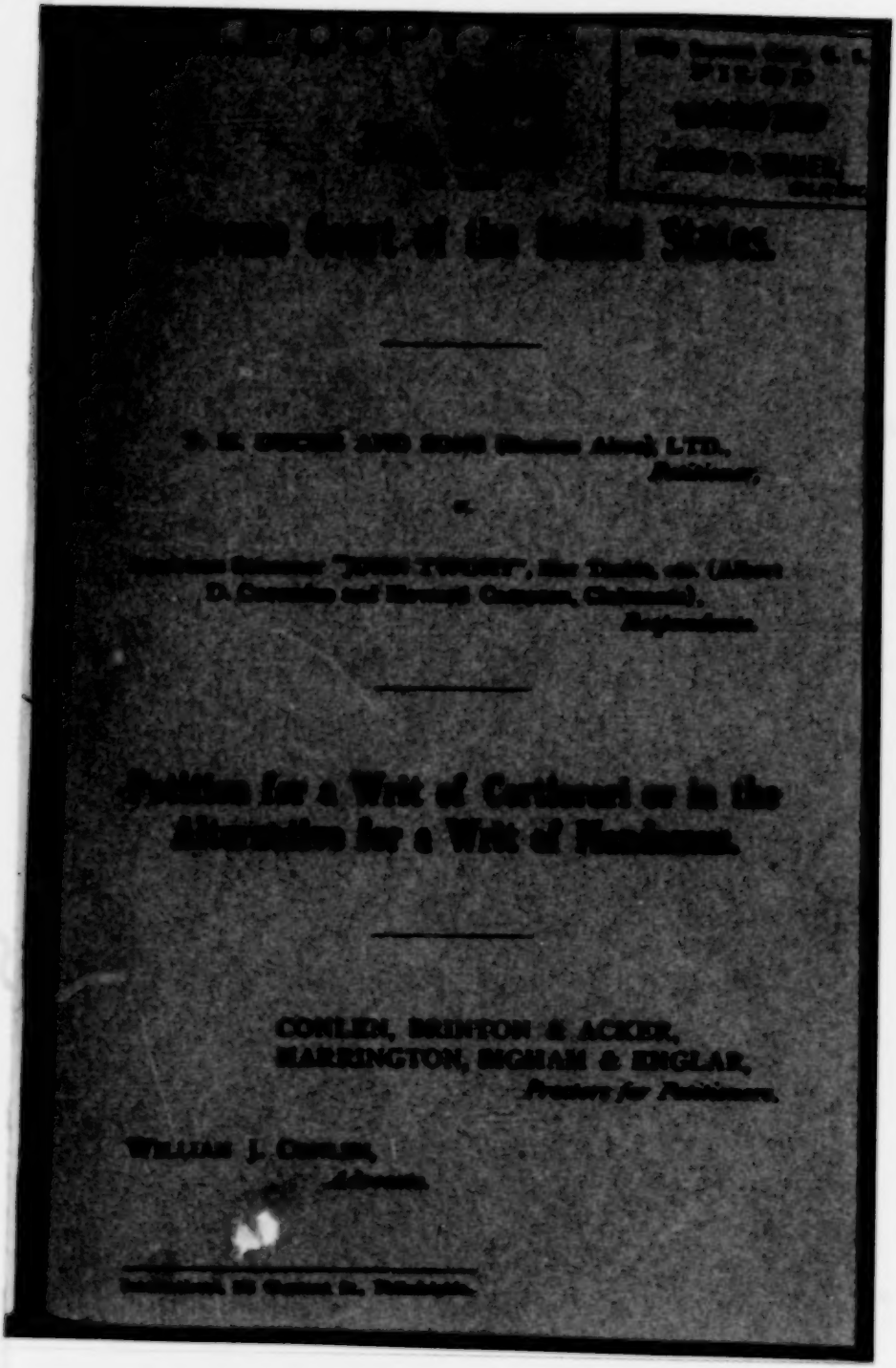

IN THE

Supreme Court of the United States.

In the Matter of the Petition of T. M. Duché & Sons (Buenos Aires) Limited, for a Writ of Certiorari Directed to the Circuit Court of Appeals of the United States for the Third Circuit to Bring Before the Supreme Court the Case of

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

THE AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE, ETC., RESPONDENT, ALBERT D. CUMMINS AND HOWARD COMPTON,
Claimants and Appellants,

OR

in the Alternative for a Writ of Mandamus Directing the Circuit Court of Appeals of the United States for the Third Circuit to Dismiss the Motion Filed by the Appellants Therein for Leave to Withdraw Their Appeal and Requiring Said Circuit Court of Appeals to Hear and Determine Said Cause on Its Merits.

AND now comes the Libellant-Appellee above named, by Conlen, Brinton & Acker, and Harrington, Bigham & Englar, its Proctors, and moves this court upon a certified copy of the Transcript of the Record herein, and upon the annexed petition sworn to the seventh day of March, 1919, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United

States for the Third Circuit, to bring before this Honorable Court the case of T. M. Duché & Sons (Buenos Aires), Limited, Libellant-Appellee, against the American schooner *"John Twohy,"* her tackle, etc., Respondent, Albert D. Cummins and Howard Compton, Claimants-Appellants, for such proceedings therein as to this court may seem just, or in the alternative, for a Writ of Mandamus, directing the Circuit Court of Appeals of the United States for the Third Circuit to dismiss the motion filed therein by the Appellants in the said cause for leave to withdraw their appeal, and to hear and determine said cause upon its merits; and your petitioner further moves this Honorable Court for such other and further relief in the premises as may be just.

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant-Appellee.

WILLIAM J. CONLEN,
Advocate.

IN THE SUPREME COURT OF THE UNITED STATES.

T. M. Duché & Sons (Buenos Aires), Ltd.,
Petitioner,
v.
American Schooner "John Twohy," her tackle, etc. (Albert D. Cummins and Howard Compton, Claimants),
Respondent.

PETITION FOR WRIT OF CERTIORARI OR IN THE ALTERNATIVE FOR WRIT OF MANDAMUS.

To the Honorable the Supreme Court of the United States of America:

The petition of T. M. Duché & Sons (Buenos Aires), Ltd., for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit, to bring before the Supreme Court the case of T. M. Duché & Sons (Buenos Aires), Ltd., v. American Schooner "John Twohy," her tackle, etc. (Albert D. Cummins and Howard Compton, claimants) or in the alternative for a writ of mandamus directing said Circuit Court of Appeals for the Third Circuit to dismiss the motion filed therein by the claimants-appellants for leave to withdraw their appeal and requiring said Circuit Court of Appeals to hear and determine said cause upon its merits,

RESPECTFULLY SHOWS to this Honorable Court, as follows:

1. Your petitioner, T. M. Duché & Sons (Buenos Aires), Ltd., is a corporation organized and existing under the laws of the Republic of Argentina, having

its principal office and place of business in the City of Buenos Aires in said Republic. The schooner "John Twohy," at all times hereinafter mentioned, was an American schooner owned by Albert D. Cummins and Howard Compton, the claimants-appellants, having an office and place of business in Philadelphia, Pennsylvania.

2. On or about July 9, 1915, your petitioner chartered the said schooner for one voyage from Buenos Aires to Philadelphia to carry a full cargo of bones in bulk.

3. In the early part of October, 1915, said schooner reported at Buenos Aires to load the said cargo, which loading was completed on October 15, 1915, on which date the captain of the said schooner delivered to your petitioner a clean bill of lading, acknowledging without qualification the receipt of 1,210,000 kilos, the equivalent of 2,670,345 pounds avoirdupois, of bones.

4. On October 21, 1915, said vessel sailed from Buenos Aires bound for Philadelphia, but a few days after leaving port, without encountering more than ordinary weather, began to leak badly and continued so to do until after December 27, 1915, when she reached the port of Philadelphia, where she discharged her cargo beginning December 30, 1915, and ending on or about January 15, 1916.

5. Upon the discharge of the vessel it was found that 389,407 pounds of the bones were wet and badly damaged and that, in addition thereto, the schooner delivered 149,069 pounds short of the weight of the bones called for by the said bill of lading.

6. Thereafter, your petitioner claimed of the schooner and her owners the sum of $932.24 for dam-

age to the part of the cargo delivered in bad condition, and $1613.14 for loss arising from the short delivery. Upon the refusal of the schooner and her owners to pay this claim, or any part thereof, a libel was filed on behalf of your petitioner in the United States District Court for the Eastern District of Pennsylvania to recover the same.

7. After hearing in the said court the Honorable Oliver B. Dickinson, on June 12, 1917, filed an opinion in which he held that the said schooner was unseaworthy and allowed to the libellant its claim for damage to the injured portion of the bones in the sum of $932.24, with costs, but refused, your petitioner contends erroneously, to allow libellant's claim in the sum of $1613.14 arising out of the short delivery, on the ground, as stated by the Court, that the exact amount of shortage was not proved with absolute accuracy.

8. A final decree was entered on April 16, 1918, from which, on April 27, 1918, the claimants of the vessel appealed to the Circuit Court of Appeals of the United States for the Third Circuit.

9. In October, 1918, said appeal came on for argument in the said Circuit Court of Appeals, but was continued until November, at which time it was again called for argument and continued until the December sessions of the said court; both of said continuances being at the request of the appellants, the respondents here.

10. When the case was called for argument at the December sessions of the said Circuit Court of Appeals the appellants therein moved for leave to withdraw their appeal, which said motion was opposed by your petitioner on the grounds, inter alia:

First.—That to allow the withdrawal of the appeal at that time would, in effect be sanctioning the taking of an appeal for the purpose of delay.

Second.—That this appeal being in admiralty, the case was before the Circuit Court of Appeals de novo and your petitioner had the right to have the Circuit Court of Appeals pass upon the merits of its claim for short delivery, which had been disallowed in the District Court, which right was a valuable and substantial one, of which your petitioner should not be deprived without its consent, and

Third.—That inasmuch as more than six months had then elapsed since the said final decree had been entered in the District Court, the allowance of the motion to withdraw the appeal would leave your petitioner without remedy or means to obtain a trial de novo of its said claim in the Circuit Court of Appeals because the time limited for the taking of an appeal by your petitioner from the decree of the District Court had then expired.

11. On February 10, 1919, the said Circuit Court of Appeals, in an opinion by Judge Buffington, stating that the point had not been previously adjudged in any reported case, decided the same against the contention of your petitioner as follows, viz.:

> "If, therefore, the appellant presents to the Clerk of this Court, within thirty days after notice to his counsel of the filing of this opinion, a certificate that the sum decreed the libellants, with interest, has been paid, together with such costs as were adjudged against the schooner in the Court below, and such printing cost as the respondent has incurred in preparation of this appeal, and

shall also pay the costs of his appeal in this Court, then the motion for the withdrawal of this appeal will be allowed; otherwise it will be refused."

12. Your petitioners are informed and believe, and therefore aver, that this holding of the said Circuit Court of Appeals is contrary to, and to a large extent nullifies the effect of the holding of this Court in the case of *Irvine v. "The Hesper,"* 122 U. S. 256, where this Court, speaking by Mr. Justice Blatchford, finally decided the status of an admiralty appeal as a trial de novo and said (p. 266):

> "It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. Yeaton v. United States, 5 Cranch 281; Anonymous, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. *We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.*" (Italics ours.)

This holding of this Court has been followed by the various Federal Courts since the time of its rendition and may be taken as settled law. It has lately been emphatically reaffirmed by this Court in *Reid v. American Express Company*, 241 U. S. 544, at pp. 548-9, where his Honor, Mr. Chief Justice White, said:

> "At the threshold it is insisted that the Court below had no authority to consider the case as before it for a new trial, that is, de novo, and to

award relief upon that theory, and that consequently it erred in reviewing the interlocutory decree which was not appealed from by which the Steamship Company was dismissed and allowed a recovery against that company, and also in reviewing both the interlocutory and final decrees so far as it was essential to grant relief to the Express Company because that company had not appealed. It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by Munson S. S. Line v. Miramar S. S. Co., Limited, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the court below authoritatively resulted from the ruling in Irvine v. 'The Hesper,' 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the Miramar Case. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention tending at least indirectly to establish the non-existence of the right to trial de novo in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

13. Under these decisions the appeal in the present case brought it before the Circuit Court of Appeals for a hearing de novo wherein your petitioner was entitled to be heard, and have said Circuit Court of Appeals pass upon that part of its claim which had

been denied in the District Court. This right in your petitioner was a valuable and substantial one and one of which it should not be deprived over its protest and without its consent.

14. Under the decisions of the Federal Courts the withdrawal of an appeal is never a privilege which appellant can exercise as of right, but in any event is at least subject to the legal discretion of the appellate court, which discretion should not be exercised in cases where to do so would operate to deprive the appellee of any valuable right.

15. The point involved in this case has not, so far as a careful search of the decisions discloses, been heretofore determined or passed upon by any Federal Court, but in certain State Court cases has been decided in accordance with the contention of your petitioner in the Circuit Court of Appeals.

In *Peterson v. Frey,* 109 Mich. 689, in a case where the statute provided that on appeal the appellate court should "*become possessed of the case, the same as if it had been originally commenced in said appellate court,*" it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Bingham v. Waterhouse,* 32 Texas 468, in a case where, under the statute, the appeal was a trial de novo, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

In each of the above cited cases the appeal, as in the present case, had been taken by an unsuccessful defendant in the court below.

16. The questions and propositions of law involved in this case are substantially as follows:

I. Where a libellant in admiralty in a District Court recovers a part of his claim and is denied the

balance thereof, and the respondent appeals to the Circuit Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the appellee?

II. Under such facts it is within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's protest and without its consent.

17. Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of certiorari, or in the alternative a writ of mandamus for the following reasons, among others, viz.:

I. Because the questions of law and practice involved herein have not been passed upon by this Court.

II. Because the public interest and the interest of jurisprudence require the decision of this Court upon the questions of law and practice involved herein.

III. Because the novelty of the point in issue, and its importance in the admiralty practice, requires that this Court pass upon and decide the same.

IV. Because the decision of the Circuit Court of Appeals in this cause is in conflict with the decisions of this Court in the cases of Irvine v. "The Hesper" and Reid v. The American Express Company above referred to.

V. Because the decision of the Circuit Court of Appeals in this cause, if allowed to stand, unreviewed by this Court, would tend to complicate the procedure in the admiralty courts, require much additional labor

and expense in admiralty causes, the filing of many additional documents and cross appeals, and would, in effect, nullify to a large extent the holding of this Court as set forth in Irvine v. "The Hesper."

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case directed to the Circuit Court of Appeals for the Third Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just, or, in the alternative, that this Honorable Court will be pleased to grant a writ of mandamus directing the said Circuit Court of Appeals for the Third Circuit to dismiss the motion filed therein by the claimants-appellants in this cause for leave to withdraw their appeal, and requiring said Circuit Court of Appeals for the Third Circuit to hear and determine said cause upon its merits.

T. M. DUCHÉ & SONS (Buenos Aires), LTD.
By its Attorneys:
CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

WILLIAM J. CONLEN, being duly sworn according to law, deposes and says that he is of counsel for T. M. Duché & Sons (Buenos Aires), Ltd., the above-named petitioner; that he has read the foregoing petition; that the same is true to the best of his knowledge, information and belief; that his knowledge is derived from the record in this case and from what has taken place in his presence and in court, and that the reason why this affidavit is not made by an officer of the petitioner

is that the said petitioner is an alien corporation and that it has no officers within this jurisdiction and there is not time to send this petition to the offices of the said petitioner in Buenos Aires for verification.

Sworn to and subscribed before me this 7th day of March, A. D. 1919. } WILLIAM J. CONLEN.

JENNIE C. O'NEILL,
(Seal) *Notary Public.*

My commission expires March 10, 1921.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and the case is one in which the prayer of the petitioner should be granted by this Court.

WILLIAM J. CONLEN,
Proctor for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the Matter of the Petition of T. M. Duché & Sons (Buenos Aires) Limited, for a Writ of Certiorari Directed to the Circuit Court of Appeals of the United States for the Third Circuit to Bring Before the Supreme Court the Case of

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

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Claimants and Appellants,

OR

in the Alternative for a Writ of Mandamus Directing the Circuit Court of Appeals of the United States for the Third Circuit to Dismiss the Motion Filed by the Appellants Therein for Leave to Withdraw Their Appeal and Requiring Said Circuit Court of Appeals to Hear and Determine Said Cause on Its Merits.

Sir:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of T. M. Duché & Sons (Buenos Aires), Ltd., sworn to the 7th day of March, 1918, we shall move the motion herewith annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 31st day of March, 1919, at the opening of Court on that

day or as soon thereafter as counsel can be heard, and we shall then and there move for such further relief in the premises as may be just.

Dated at Philadelphia, the 15th day of March, A. D. 1919.

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR.
Proctors for Petitioner.

1935 Commercial Trust Building,
Philadelphia, Penna.

ALBERT D. CUMMINS and HOWARD COMPTON,
Attorney for Respondent,
Land Title Building,
Philadelphia, Pa.

And ALBERT D. CUMMINS and HOWARD COMPTON,
Claimants,
Bullitt Building, Philadelphia, Pa.